PERUNDING ALAM BINA SDN BHD

v.

ERROL OH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[SUIT NO: S5-23-05-1996]
15 AUGUST 1998

TORT: *Defamation - Libel in newspaper - Architects, professionalism and ethics - Whether articles defamatory - Justification - Imputation - Whether pleaded in statement of defence - Fair comment*

The plaintiff was the architect for an approved project to build a hospital in Damansara Kim in 1983 with 157 car park bays to be located on two floors in a building adjacent to the hospital. The project was shelved but later revived in 1995 by a new proprietor who wanted to increase the number of car park bays. This involved constructing additional floors to the car park building which was permitted under the new guidelines issued by the Majlis Perbandaran Petaling Jaya ('MPPJ'). However, the building plans previously approved had to be amended and reapproved. Notwithstanding, the new proprietor decided to go ahead with the construction of the additional floors pending the approval of the amended plans after obtaining the advice of the plaintiff that the penalty for proceeding without prior approval was either a fine or an order for demolition.

The residents in the area protested against this additional construction which was extensively covered by the press. The local Member of Parliament ('DW4') also took up the issue. MPPJ eventually issued stop-work and demolition orders against the plaintiff. In the course of these events, two articles were published which now formed the basis of the plaintiff's instant claim for damages for defamation. The first was by *The Malay Mail* entitled "Act Indirectly Proposal-Way To Handle Unprofessional Architects And Engineers, says MP" and the second by *The New Straits Times* entitled "Hospital Developer Yet To Demolish Illegal Floor".

The defendants submitted that their plea of justification was in relation to the proper forum and manner in dealing with unprofessional architects which was to lodge a complaint with the relevant regulatory body. The plaintiff responded that this particular imputation was not pleaded in the statement of defence. On the defence of fair comment, the plaintiff argued that: (i) the comments were not fair as it was not the supervisory officer ('SO') for the project; (ii) the ultimate decision on whether to proceed with the construction of the

additional floors without prior approval was with the proprietor; and (iii) since the issuance of the new guidelines, it was the industry practice to build first whilst awaiting approval.

Held:

[1] In the article in *The Malay Mail*, the subject matter was confined to a group of professionals: the engineers and architects. It focused on elements associated with unprofessional conduct. There was also a direct reference to an incident involving the plaintiff. By the natural and ordinary meaning of the words used, an ordinary reasonable person reading the statements would have the impression that the plaintiff was unprofessional and unethical. Therefore, these statements were defamatory.

[2] The defendants' plea of justification failed. There was no disclosure as to what the facts alleged to be true imputed. The imputation which the defendants sought to rely upon subsequently in their submissions was not pleaded in the statement of defence.

[3a] Although there was a SO appointed for the project, it did not release the plaintiff, as the architect of the project, from liabilities and responsibilities over the same.

[3b] Although the ultimate decision on whether to proceed with or without approval for the amended plans laid with the proprietor, when the law was broken, the plaintiff, as the architect, must report the matter to the authorities. Otherwise, it might not only be an accessory to the commission of an offence but also liable for unprofessional conduct.

[3c] The exposure of such non-compliance with building plans was certainly a matter of public interest. So was the role of the architect. Not only an honourable and respected profession serving the community was involved, but also the safety of structures constructed or to be contructed in this country. On this, DW4, as a member of the public had a legitimate right to comment, and his comments on the conduct and ethics of the plaintiff were fair. There was no dishonesty or malice on the part of DW4 and the respective defendants, nor were these ever proved. Therefore, the defence of fair comment must succeed.

[4] Reading the article in *The New Straits Times* as a whole, an ordinary reasonable man would not impute the alleged defamatory statements to the plaintiff. Although the incident between the plaintiff and the Board of Architects was reported, it was independent and did not connect the plaintiff to those other occurrences reported in the earlier paragraphs. Therefore, these statements were not defamatory of the plaintiff.

[Plaintiff's claim dismissed.]

Case(s) referred to:
Lucas Box v. News Group Newspapers Ltd [1986] 1 All ER 177 ***(refd)***

Other source(s) referred to:
Libel and Slander, Gaitley, 8th edn, para 1111

For the plaintiff - N Navaratnam (Reuben Mathiavaranam & Zaheeda Ariff with him); M/s Azman, Davidson & Co
For the defendants - Robert Lazar (Felix Raj with him); M/s Shearn Delamore & Co

Reported by Cindy Chan

JUDGMENT

James Foong J:

The plaintiffs claim that they are defamed in two articles written and published in The Malay Mail and the New Straits Times respectively. The first (the 1st article) is written by the 1st defendant and published by the 5th defendants on 4 December 1995. The second (the 2nd article) is written by the 3rd defendant and published by the 5th defendants on 22 December 1995. The 2nd and 4th defendants are the editors of the 5th defendants' daily: The Malay Mail and the New Straits Times respectively.

The articles and the relevant paragraphs therefrom claimed to be defamatory are as follows:

1st article (in The Malay Mail on 4 December 1995)

(i) Act Indirectly Proposal-Way To Handle Unprofessional Architects And Engineers, says MP.

(ii) He however pointed out that developers and contractors were not the only culprits as consultant engineers and architects were ethically bound to ensure that projects were built according to plans.

(iii) There have been too many accidents and problems due to poor safety measures and builders cutting corners, he said.

(iv) The local authorities should take the initiative to complain to bodies like the boards of engineers and architects if they believed that the consultants had been negligent.

(v) The boards of engineers and architects could penalise consultants including deregistering them for breach of ethics, he added.

(vi) In July, Lim complained to both bodies against the architects and engineers of a private hospital project in Damansara Kim where the council had slapped a stop-work order on the car-park buildings as an extra floor was illegally built.

(vii) It was reported last August that the Gombak District Council was proposing to adopt a policy of refusal to deal with architects and engineers who were unprofessional in handling projects to ensure that the district was disaster free.

2nd article (in the New Straits Times on 22.12.1995)

Heading

(i) Hospital Developer Yet to Demolish Illegal Floor.

Caption below photograph

(ii) Shabby safety measures ... note the netting and scaffolding which are dangling precariously.

(iii) He said the developer's scaffolding had not been secured around the main building of the hospital.

(iv) Residents fear for their safety. Once a huge plank fell from the building onto the road. Fortunately, no one was around at that time.

(v) It was reported recently that the Board of Architects will be deciding next month whether to charge the consultant architect of the project, Perunding Alam Bina Sdn Bhd, for allegedly breaching their professional code of conduct.

By the above statements, the plaintiffs aver that they are the persons referred to, and by their natural and ordinary meaning and/or by way of innuendo it imputes that the plaintiffs were "lackadaisical in their supervisory functions as consultant architects, have failed to give out proper instructions, are unethical, unprofessional, negligent, incompetent, are in breach of the architect's professional code of conduct and are privy to the construction of an illegal car-park building at the Damansara Kim Specialist Hospital."

As a result of these statements, the plaintiffs insist that, as consultant architects, their credit and reputation are gravely injured and lowered in the estimation of right thinking members of society generally, and have also suffered damages.

The defendants though admit writing and publishing the two articles respectively set forth the following defences:

(1) The statements, its natural and ordinary meaning, or by way of innuendo were not defamatory in the nature of claim by the plaintiffs.

(2) Justification.

(3) Fair comment.

Background

In 1983 plans to build a hospital in an area known as Damansara Kim was approved. The plaintiffs were the architects. There were 157 car parking bays allowed to be located on two floors in a building adjacent to the hospital. This entire hospital and adjacent car-park building project was however shelved. But in 1995 it was revived by new proprietor who wished to increase the car-park bays. This would involve construction of additional floors to the carpark building. By this time new guidelines were issued by the local authorities, Majlis Perbandaran Petaling Jaya (MPPJ) permitting such increase but building plans previously approved need to be amended and reapproved by the said local authorities. When this requirement was disclosed to the proprietor by the plaintiffs, the proprietor enquired into the consequences of building first before the approval. According to the plaintiffs, they advised their client that there will either be a fine or an order for demolition. They cited the case of Jaya Supermarket in Petaling Jaya which was slapped with a fine for erecting extra office floors before amended building plans were approved. The proprietor took a decision and went ahead with the construction of additional floors of the car-park building without prior approval. While such construction was in progress, application was made by the plaintiffs to amend the original approved plan for such increase.

The attention of the press was drawn to this issue by the residents of the area who protested to the construction of this hospital in their vicinity. When it was discovered that the proprietor was constructing additional car-park floors without prior approval opposition intensified, with the media giving fairly extensive coverage. The Member of Parliament for this constituency, DW4, also joined in, and took issue.

Eventually, stop work and demolition orders were issued by MPPJ to the plaintiffs on the construction of the car-park, but by this time, an additional floor was added. Instead of demolishing this floor, an agreement was eventually reached with MPPJ where this newly constructed floor is permitted to remain, but to act only as a roof.

The hospital has been completed and in operation. The car-park building remains with only two floors and a roof.

It was during the height of the dispute over the construction of additional floors to the car-park building that these two articles were published.

a ***Analysis***

Though the two newspapers are owned by the same publisher, I intend to deal with the two alleged defamatory articles separately. The reason is that it involves different writers, editors and newspapers.

b ***1st Article***

Is This Defamatory?

Here the court must determine whether the words complained of in this article impute the plaintiffs of some quality which would be detrimental, or adverse c of such quality which is essential, to successfully carry on their profession as architects.

To decide on the issue of imputation, the objective test of the reasonable man with ordinary intelligence, and of general knowledge and experience in worldly d affairs would likely to understand the alleged defamatory words without being fettered with strict legal rules of construction, but may include any implications or inferences, must be used.

To start of with, there is a heading which reads:

e > 'Act Indirectly' Proposal-Way To Handle Unprofessional Architects and Engineers, says MP.

The article then began with some quarters questioning the legality of any move by local authorities to blacklist these professionals for handling projects unprofessionally; instead the next best thing is to act against them directly f since they are bound by their code of ethics. DW4 then commented on this, and referred to instances where these consultants must be held accountable in cases where construction deviated from approved plans. He proceeded to "point out that developers and contractors were not the only culprits as consultant engineers and architects were ethically bound to ensure that projects were built g according to plans." In the next paragraph, poor safety measures was referred to, followed by a suggestion that "local authorities should take initiative to complain to bodies like the board of engineers and architects if they believed that the consultants had been negligent." It then elaborated that such professional governing bodies "could penalise consultants, including deregistering them, for breach of ethics." Then in the preceding paragraph the h plaintiffs are directly referred to as follows:

> In July, Lim (DW4) complained to both bodies against the architects and engineers of a private hospital project in Damansara Kim where the council had slapped a stop-work order on the car-park building as an extra floor was i illegally built.

From the above, the first thing that comes to light is that the subject matter is confined to a group of professionals: the engineers and architects. It focuses on their unprofessionalism by choice of words, such as in the heading: "way to handle unprofessional architects and engineers." Then "ethics", and breach of it, "safety measures" and "negligence" followed. These are obviously elements associated with unprofessional conduct. Finally, there is a direct reference of an incident involving the plaintiffs. By the natural and ordinary meaning of the words used, I am of the opinion that an ordinary reasonable person, reading the alleged defamatory statements will have the impression that the plaintiffs who are involved in that specific incident are unprofessional and unethical in their conduct; that they are lackadaisical in their supervisory function as an architect, failed to give proper instructions, negligent and in breach of ethics. These statements are therefore, in my opinion defamatory.

Defences

I now move on to the defences put up by the defendants. They are: justification and fair comment.

Justification

A plea of justification means that all words were true, and covers not only the bare statement of fact contained in the alleged libel but also any imputation which the words in their context may be taken to convey; it affirms all that attaches to them as their natural and reasonable meaning; the inference that would ordinarily be drawn from them – see Gaitley on *Libel and Slander* 8th edn at para 1111.

From the very initial stage, the plaintiffs have alleged in their statement of claim that the imputation of the defamatory statement is that the plaintiffs were unprofessional and incompetent in their work. Though the defence pleads justification, and even with particulars to certain facts being true, but there is no disclosure as to what these facts alleged to be true imputes. When confronted with this, the defendants, in their submissions, declared that the justification is in relation to the proper forum and manner in dealing with unprofessional architects was to lodge a complaint with the relevant regulatory body; not to blacklist them. I agree with the plaintiffs' counsel that this particular imputation on the facts alleged to be true is no where stated in the statement of defence; the plaintiffs are caught by surprise with such an assertion. In such a situation I agree with Lord Ackner's observation in *Lucas Box v. News Group Newspapers Ltd* [1986] 1 All ER 177:

> However, we would go even further and say that, whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the plaintiff what is the case he is seeking to set up. The particulars themselves may make this clear, but if they are ambiguous then the situation must be made unequivocal.

But to be unequivocal at this stage will not allow the plaintiffs a chance to present their case since it was the plaintiffs who first brought this out in their submissions when replying to the defendants.

Going by the rules of pleadings, where a party's case must be confined to the four walls of its pleadings, I have to find that the defendants alleged meaning imputed from the facts disclosed as true cannot be accepted; it is not pleaded. Except for the truth of the fact that a complaint lodged by DW4 to the Board of Architects being pleaded, there is no justification asserted that it imputes that the plaintiffs were unprofessional and incompetent in their work. For this, the plea of justification must fail.

Fair Comment

In order to succeed in the defence of fair comments, the defendants must prove that:

(1) the words alleged to be defamatory were comments and not statement of facts;

(2) there was a basis for the comment;

(3) the comment was of public interest; and

(4) that it was made honestly and without malice.

Commencing with the title of the article, right through other parts of the defamatory statements, I find that principally these were comments or opinions made by DW4. It was his views on the plaintiffs. And in order to decide whether these comments were fair, or have any basis, the facts on which they were based must be examined to determine whether they were true, or substantially true.

To began with, I find it proven that there was a stop-work order on the car-park building because of an extra illegal floor being constucted (see exh. D6). It was also correct that DW4 had complained to the Board of Architects about the plaintiffs. Also true was the fact that the Board of Architects could penalise its members, including deregistering them, for breach of ethics. There was also a report last August before the publication of the 1st article that the Gombak district council was proposing to adopt a policy of refusing to deal with architects and engineers who were unprofessional in handling projects to ensure that the district was disaster free. With these facts being true, the next step is to consider whether the comments were fair, or whether there were any basis for them. The plaintiffs have argued that it was not. They forwarded the following reasons: Firstly, they were not the supervisory officer (SO) of the project. There was a particular person appointed as SO in the building

agreement between the proprietor and the contractor. Secondly, though the plaintiffs can advise their client, but ultimately the decision of whether to proceed with construction of the additional car-park floor without prior approval was with the proprietor. In this case, since the proprietor had elected to proceed before approval, the plaintiffs should not be blamed for it. Thirdly, since the new guidelines allowed additional parking bays, it was the industry's practice to build first while awaiting for approval. And according to precedents, only a fine will be imposed, or at most – demolition.

I disagree with all the contentions of the plaintiffs. To start of with, though there was a SO appointed for this project, it does not release the plaintiffs, as architects of the project, from liabilities and responsibilities over the same. The SO was appointed solely in the agreement between the proprietor and the contractor for the purpose of carrying out the construction according to the terms of the building contract. The plaintiffs' role continued to be that of a consultant architects of the project, and in this capacity, they were responsible for the overall project, which included the construction in accordance with approved building plans. When there was a need to amend the car-park building plans, the SO did not perform such task. It was the plaintiffs who had to apply as qualified and registered architects. Thus to the authorities and general public, it was the trust placed upon the plaintiffs by laws that they were the responsible professionals to carry out the construction of the structure safety, and this was by way of in accordance with approved plans, which had been previously studied, examined and passed.

Though undoubtedly the ultimate decision of whether to proceed with, or without approved amended plans lies with the proprietor, but when the law is broken, the plaintiffs, as architects, to my mind, must report the matter to the authorities. Otherwise they may not only be an accessory to the commission of an offence but also liable to unprofessional conduct. If everyone adopts the attitude that it is "the client's decision" and not the architect's, and that it is the general practice of the industry to build first before approval, then, there is practically no necessity to obtain approval of plans for any building. And if the argument relates to only major changes needs approval first, then where is the line to be drawn between what is major and minor. Is the episode of Jaya Supermarket which built an additional four office floors without prior approval a minor deviation since only a fine was imposed? If this is the attitude of the industry to rely on the precedent of Jaya Supermarket experience, then it will be practically forcing the authorities to compromise; very similar to thumping the nose of the authorities. Surely, as citizens and professionals, the plaintiffs must ensure that the law must be followed, even at the risk of being discharged by the client; otherwise, the architectural profession will suffer irreparable damage if allowed to continue with such mentality.

The exposure of such non-compliance of building plans was certainly a matter of public interest. So was the role of the architects. Not only an honourable and respected profession serving the community was involved, but also the safety factor of structures constructed or to be constructed in this country. On this, DW4, as a member of the public had a legitimate right to comment, and I think in the light of the situation, his comments on the conduct and ethics of the plaintiffs were fair. I do not detect any dishonesty and malice on the part of DW4 and the respective defendants, nor were these ever proved.

On these grounds stated above, I find that the defence of fair comments must succeed.

2nd Article

Is The Alleged Statement Defamatory?

The heading of this article bears the following:

> Hospital Developer Yet To Demolish Illegal Floor.

Besides the two pictures with captions, one of which the plaintiffs claim to be defamatory with words: "shabby safety measures ... note the netting and scaffolding which are dangling precariously", the article starts of with a report on the feelings of the residents in the area being baffled over the delay by the developers in demolishing the illegally constructed level of parking floor. Then it proceeds to talk about the residents' worries about the new scaffoldings being put up around the car-park site which may indicate that work thereon may be allowed to continue. Next is a statement by the committee member of Rukun Tetangga in the area complaining that the developer's scaffolding around the main building of the hospital had not been secured and the experience of a large plank falling from above onto the road. In the next paragraph is a report on the failure of fogging around the worksite. This is then followed by the paragraph which refers directly to the plaintiffs which says that the Board of Architects will be deciding next month whether to charge the plaintiffs for allegedly breach of their professional code of conduct. The plaintiffs claim that all these imputes them as being unprofessional, unethical and negligent.

The defendants argued otherwise. They claim that, except for the paragraph which directly refers to the plaintiffs, the entire alleged defamatory statements relates to the developer; it does not impute the plaintiffs at all.

I agree with this defendants' contention. I do not see how these alleged defamatory statements (except that directly concerning the plaintiffs) is in reference to the plaintiffs.

To begin with, the heading itself speaks of the developer who had yet to demolish the illegal floor. Next comes the scaffolding. Again, it expressly refers it to that of the developer's. The caption beneath the picture of the scaffolding must be associated and read with the paragraph concerning the developer's scaffolding. There is no mention of the scaffolding belonging to the plaintiffs or that they were responsible for them in any part of this article. Then comes the falling plank. It is unimaginable that this can be associated with the plaintiffs when the prior paragraph talks of the developers' scaffolding, which of course, could have prevented such an incident. Reading this article as a whole, I do not believe that an ordinary reasonable man can impute the alleged defamatory statement to the plaintiffs. Though the incident of the plaintiffs with the Board of Architects is reported, but it is one of the incidences that befalls on this project. It is independent and does not connect the plaintiffs to those other occurrences reported in the earlier paragraphs. For this, I cannot accept that these statements are defamatory concerning the plaintiffs.

Findings

Accordingly, I hereby dismiss the plaintiffs' claim with costs.